No. 80-608

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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. Appellees contend that they have a First Amendment right to place circulars and comparable items, free of charge, in letter boxes and other receptacles designated by the Postal Service for the receipt or delivery of the United States Mail. See Domestic Mail Manual (DMM) 151.1. This contention ignores the special and limited purposes for which these receptacles are used.

a. As we have explained in our opening brief (Gov't Br. 3 n.2), the DMM requires a postal customer to provide an appropriate receptacle for the receipt of mail as a condition to the Service's delivery of mail to the customer's address. Even though the letter box is furnished by the customer, it becomes a part of the system for the delivery of mail as a result of its acceptance by the Postal Service as an authorized receptacle. By virtue of that acceptance, for example, the sender and recipient both are afforded the significant

protection of federal statutes prohibiting the damaging or destruction of letter boxes and the theft, defacing, or destruction of mail deposited therein, 18 U.S.C. 1702, 1705 and 1708, just as federal statutes protect other property used in the delivery of mail and protect the mail itself at other stages of its transmittal. See, *e.g.*, 18 U.S.C. 1702 and 1707.

Postal Service regulations in the DMM provide that letter boxes and other receptacles designated for the delivery or receipt of mail "shall be used exclusively for matter which bears postage" (DMM 151.2).[1] This requirement that the receptacle the customer furnishes be used exclusively for mail-related purposes is a reasonable condition to the incorporation of that depository into the mail delivery system and the furnishing of federal protection to it. The statute involved in this case, 18 U.S.C. 1725, merely reinforces this protection for the integrity of the letter box by prohibiting, under pain of criminal sanctions, the deposit into the box of any mailable matter on which postage has not been paid.

b. The reasonableness of these restrictions is underscored by a consideration of the statutory scheme establishing the Postal Service's broad mandate. Under 39 U.S.C. 403(a), the Postal Service is to "plan, develop, promote, and provide adequate and efficient postal services at fair and

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[1]The provision in DMM 151.2 is comparable to a provision first included in *Instructions for the Guidance of Postmasters and Carriers in the Conduct of the Rural Delivery Service* promulgated by the Postmaster General in 1907. Section 120.2 of those *Instructions* provided that "mail boxes erected on rural routes are intended exclusively for the reception of mail matter regularly in the mails, and mailable matter deposited in rural mail boxes is subject to the rules regulating mail matter, including the payment of postage thereon at regular rates." A similar regulatory prohibition was made applicable to city and village routes in 1934. See Gov't. Br. App. 1a-2a. The statute at issue in this case, 18 U.S.C. 1725, was enacted against the background of these pre-existing regulatory prohibitions.

reasonable rates and fees." Section 403(b)(1) similarly directs the Postal Service "to maintain an efficient system of collection, sorting, and delivery of the mail nationwide." See also 39 U.S.C. 404(a)(1). Under these provisions, and quite aside from the specific congressional direction in 18 U.S.C. 1725, the Postal Service plainly was authorized to promote an "efficient system of collection, sorting, and delivery" by providing in regulations that a letter box designated for the delivery of mail may not be used for other purposes. As we explain in our opening brief (Gov't Br. 21 & n.14), for example, the customer may place in the letter box outgoing mail and money to be picked up by the letter carrier. The Postal Service reasonably could provide for efficient "sorting" of materials in a mailbox and "collection" of letters and money left there for the carrier by excluding other materials from the receptacle. See also Gov't Br. App. 2a. The congressional reports on 18 U.S.C. 1725 reveal a similar purpose of preventing "the stuffing of letter boxes with extraneous matter" (H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934)).

Limiting the use of letter boxes to matter that bears postage also furthers the congressional purpose of providing postal services "at fair and reasonable rates and fees" (39 U.S.C. 403(a)) by ensuring that those who seek to take advantage of the security and integrity of letter boxes share in the costs of operating the postal delivery system of which those boxes are a part. Cf. 39 U.S.C. 403(c). The congressional reports on 18 U.S.C. 1725 expressed a similar purpose, noting that many business concerns had adopted the practice of having their circulars delivered by private messenger to letter boxes erected for the receipt of mail and that "[t]his practice is depriving the Post Office Department of considerable revenue on matter which would otherwise go through

the mails" (H.R. Rep. No. 709, *supra*, at 1; S.Rep. No. 742, *supra*, at 1).

2. Despite these legitimate purposes that are furthered by 18 U.S.C. 1725, appellees contend that the statute may not be applied to them because to do so would infringe upon their First Amendment right to communicate with residents of their communities. Stripped to its essentials, however, appellees' claim is that the First Amendment affords them a right to use a portion of the postal delivery system without paying the established postage. This novel contention that the First Amendment bars the imposition of a reasonable, non-discriminatory fee[2] for the use of the mails and facilities related thereto is without merit. See, *e.g.*, *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 130-131 (1977); *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 155 & n.16 (1946); *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407, 431 (1921) (Brandeis, J., dissenting); *Ex parte Jackson*, 96 U.S. 727, 732 (1878).[3]

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[2]Amici Independent Sector and its member organizations err in contending (Br. 5-6) that express mail companies that are exempt from the ban against competing with the Postal Service (see, *e.g.*, 39 C.F.R. 320.6) are, for that reason, permitted to deposit their materials in designated letter boxes without the payment of postage. Although an exemption from the Private Express statutes excuses the payment of lawful postage for the *carriage* of letters outside of the mails, it does not excuse the payment of the required postage where the authorized private carrier uses a designated letter box to effectuate a *delivery*. See 45 Fed. Reg. 56055 (1980). Accordingly, contrary to amici's contention (Br. 6), a private carrier covered by the Private Express statutes would have the requisite "intent to avoid payment of lawful postage" under 18 U.S.C. 1725 if he deposited mailable matter in a letter box without affixing the required postage to it. Accordingly, no equal protection issue is presented.

[3]Appellees' reliance (Br. 52-53, 72-73) on these same decisions as support for their asserted right to use letter boxes free of charge is misplaced. The First Amendment issue discussed in these cases concerned the government's authority to bar matter from the mail, or

3. Appellees assert (Br. 25-29) that, in many situations, use of the mails is not a practical alternative to the deposit of circulars in letter boxes free of charge because appellees often must distribute their materials quickly and cannot risk a possible delay in mail delivery. The district court relied on the same factor in finding an absence of adequate alternatives for appellees. See J. S. App. 3a-4a, 10a. Appellees and the district court both misapprehend the nature of the prohibition in 18 U.S.C. 1725. That section does not provide that only Postal Service personnel may place mailable matter in an approved letter box or that an individual must utilize the mails in order for his letter to be deposited in such a box. Section 1725 prohibits only the deposit of mailable matter in a letter box without the appropriate postage. If appellees' members and supporters affix the proper postage to their circulars, they may personally deposit them in letter boxes with whatever dispatch they desire. Therefore, asserted delays or other difficulties in using the mails have no bearing on the validity of the statute. The only issue, then, is whether appellees have a right to use a part of the postal delivery system without paying the standard fee for doing so. Appellees have fallen far short of demonstrating an inability to pay the postage

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inhibit its delivery, on the basis of content. See also *Blount* v. *Rizzi*, 400 U.S. 410 (1971). As we have explained (Gov't Br. 13-14), 18 U.S.C. 1725 is content-neutral. The decisions cited in the text do not intimate that Congress cannot charge a reasonable rate for using the postal system. *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975), relied upon by amici Piedmont Heights Civic Club, et al. (Br. 18 n.4, 31, 35), likewise concerned government restraints based on content. There was no suggestion in that case that the City of Chattanooga could not have charged a reasonable, non-discriminatory fee for the use of the City's auditorium to show the musical "Hair."

required for the use of letter boxes[4] or a constitutionally significant impairment of their ability to communicate with persons in the community if they do not use letter boxes. Gov't Br. 15-17.[5]

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[4]In arguing that they cannot afford to pay postage, appellees point (Br. 3, 29) to testimony that many civic associations have little money in their treasuries. But appellees have not demonstrated that their *members* and *supporters*, for whose benefit appellees exist, are without the necessary financial resources to pay postage. We appreciate that an association, even one as loosely knit as many neighborhood groups, has an identity that is to some extent distinct from that of its members. But we do not believe an organization's members, if they have adequate funds of their own, can hide behind the veil of the organization's impecunity to assert a personal constitutional entitlement based on a lack of financial resources; nor do we believe that the organization itself can be excused from turning to its own members and supporters for additional contributions before arguing for a constitutional entitlement in its own right based on a lack of funds.

Appellees rely (Br. 29) on only two pieces of testimony for the proposition that civic associations cannot raise the funds necessary to pay postage. The first related to civic groups in New York City, not to appellees (A. 56). The other was a statement by a witness affiliated with the Highlands Civic Association in Westchester County (Tr. 332-333) that its members would "tend to stop being dues-paying members" if dues were increased to cover postage (Tr. 348). Even assuming *arguendo* that this testimony could be regarded as persuasive and applicable to appellees and all of their affiliated organizations, the fact that an association cannot muster financial resources from its members and supporters who prefer not to increase their contributions hardly furnishes a basis for asserting a constitutional right to turn to the Postal Service for comparable support through a waiver of postal fees. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 94-96 (1976).

[5]Appellees also argue (Br. 11-12) that recipients would prefer to have notices placed in their letter boxes rather than left on a doorknob or elsewhere where the circulars might alert potential burglars to the fact that no one is home. It is not clear how a recipient's preference for other methods of delivery or for appellees to be entitled to dispense with paying lawful postage rises to the level a First Amendment right. In any event, if recipients wish to avoid alerting burglars, they may post a

4. Finally, appellees seek to support their right of free access to letter boxes used for the delivery of mail by arguing (Br. 30-39, 57-62) that the purposes underlying 18 U.S.C. 1725 and its regulatory counterparts would not be significantly frustrated if those provisions were not enforced against them. Appellees argue, for example (Br. 37-39, 58), that the purpose of 18 U.S.C. 1725 to protect postal revenues is not advanced by applying the statute to them because civic groups cannot pay postage[6] and the Postal Service therefore would lose no revenue by allowing them to use letter boxes free of charge. But in enacting a statute applicable to an operation as vast and multifaceted as the Postal Service, Congress surely may legislate with the generality of cases in mind without thereby rendering the legislation vulnerable in every individual situation in which a compelling need for the particular restriction cannot be demonstrated. Given the Postal Service's self-evident need

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notice requesting that no circulars be delivered by appellees or may assume the modest cost of purchasing a separate receptacle for receiving such items.

[6]Appellees also renew the argument (Br. 101-103) that 18 U.S.C. 1725 cannot be applied to them because it was intended to bar the deposit only of commercial materials. However, the statute on its face bars the deposit of "*any* mailable matter" (emphasis added) without proper postage, and the legislative history makes clear that Congress and the Postal Service understood that the provision would apply to noncommercial as well as commercial material. See Gov't Br. 5-6 n.5. Moreover, as Congress was aware when it enacted 18 U.S.C. 1725, the pre-existing regulation applicable to rural letter boxes, after which the statute was patterned, excluded noncommercial mailable matter on which postage had not been paid. J.S. App. 26a-27a; see note 1, *supra*. Furthermore, the statutory purposes of protecting postal revenues and preventing the cluttering of letter boxes are advanced by applying the prohibition to noncommercial as well as to commercial matter. Finally, the creation of exemptions in the Private Express statutes for organizations such as appellees' whose members deliver materials without charge (see brief of amici Piedmont Heights Civic Club, et al. 21) demonstrates that Congress knows how to fashion special exemptions in this area when it so desires.

for revenues generally, for example, the Service is not required to make a case-by-case showing of a compelling need for the incremental revenue to be realized from charging postage to each organization or individual who desires to use the postal system to engage in expression protected by the First Amendment. This would inevitably lead to chaos and arbitrary treatment, rather than the desired uniformity, fairness, and ease of administration in establishing standards for access to millions of letter boxes in the country.

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

WADE H. MCCREE, JR.
Solicitor General

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